No. 01-1184

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

FRANCISCO JIMENEZ RECIO AND
ADRIAN LOPEZ-MEZA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a conspiracy ends as a matter of law when the government frustrates its objective.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 258 F.3d 1069.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2000, and amended on July 31, 2001. A petition for rehearing was denied on October 30, 2001 (Pet. App. 45a-46a). On January 18, 2002, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 27, 200. A petition for a writ of certiorari was filed on February 14, 2002, and granted on May 28, 2002. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, both respondents were convicted in the United States District Court for the District of Idaho of conspiring to possess cocaine and marijuana with intent to distribute them, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A), and 21 U.S.C. 846. Lopez-Meza C.A. E.R. 1-2. Respondent Recio was sentenced to 126 months' imprisonment, to be followed by five years' supervised release. Recio C.A. E.R. 7-8. Respondent Lopez-Meza was sentenced to 132 months' imprisonment, to be followed by five years' supervised release. Lopez-Meza C.A. E.R. 67-68. The court of appeals reversed respondents' conspiracy convictions for insufficient evidence. Pet. App. 1a-10a.

1. On November 18, 1997, at 1:18 a.m., a Nevada police officer stopped a northbound flatbed truck occupied by Manuel Sotelo and Ramiro Arce. The police seized 369 pounds of marijuana and 14.8 pounds of cocaine. The drugs were worth between $10 and $12 million. Sotelo and Arce claimed ignorance of the drugs but said they had agreed to drive the truck to Nampa, Idaho, where they were supposed to leave the truck parked at the Karcher Mall. Pet. App. 2a, 4a, 19a, 23a.

Arce decided to cooperate, and government agents set up a sting. The following day the government transported the truck to Idaho and parked it at the Karcher Mall.[1] Arce called an Arizona pager number.

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[1] The court of appeals erred when it stated that the original drivers of the truck were arrested on the same day as respondents. See Pet. App. 2a (original driver "arrested earlier that day"). In fact, the truck was delivered to the Mall, where respondents were arrested, on November 19, one day after the arrest of Sotelo and Arce. See Pet. App. 19a (Gould, J., dissenting); 3 Gov't C.A. Supp. E.R. 171 (officer's testimony that truck was placed at Karcher Mall "[o]n the 19th, around 10:00 in the morning").

When someone returned the page, Arce mentioned the truck's location to the caller, who stated that he would "call a muchacho to come and get the truck." Pet. App. 2a, 5a, 19a. About three hours later, respondents drove into the mall parking lot in a blue car and pulled up to the truck. Recio got out of the car and into the truck. Both Recio and Lopez-Meza drove west on different back roads. The agents ultimately decided to stop the vehicles, and they arrested Recio and Lopez-Meza. *Id.* at 2a, 4a, 19a.

Recio and Lopez-Meza each made false statements to the agents to explain their actions. Pet. App. 4a. Recio denied ever having been dropped off at the Karcher Mall. He said that he had been shopping and that he ran into a man who offered him $250 to drive the truck to Recio's house, where the man would pick it up later. Recio explained that he decided to take back roads instead of a much more direct route because "[he] just like[d] to drive in the country." *Id.* at 22a. Recio was carrying a pager, a phone card, and a "'non-owner' driver's insurance" policy, which covers the named insured for operation of a vehicle owned by another. *Id.* at 4a, 5a. Recio had renewed the policy shortly before the seizure. *Id.* at 5a.

When the police stopped Lopez-Meza, they smelled marijuana in the car. Pet. App. 19a. The police recovered two pagers and two phone cards from him. *Id.* at 4a, 5a, 27a. Lopez-Meza told the police that he had been "out driving around" and that he was going to see his girlfriend, whose last name and address he could not recall. *Id.* at 26a-27a.

2. On January 16, 1998, a federal grand jury returned a superseding indictment charging Recio and Lopez-Meza with conspiracy to possess cocaine and marijuana with intent to distribute them and possession

of cocaine and marijuana with the intent to distribute them. Pet. App. 69a-70a. They were each found guilty on both counts. *Id.* at 60a. Respondents filed post-trial motions for judgment of acquittal in which they argued that their conspiracy convictions were invalid under *United States* v. *Cruz*, 127 F.3d 791 (9th Cir. 1997), cert. denied, 522 U.S. 1097 (1998). See Pet. App. 59a-68a.

In *Cruz*, the government prosecuted a conspiracy charge against Billy Cruz, a drug courier who agreed to deliver 210.7 grams of methamphetamine after the original courier, Peter Balajadia, had, unbeknownst to Cruz, been arrested with the drugs. The Ninth Circuit held that Cruz was innocent of the charged conspiracy because he joined it after the government had seized the drugs, even though Cruz, the seller, and the buyer were all unaware of the seizure. The *Cruz* court reasoned that "it was factually impossible for Cruz to have been a member of th[e] conspiracy because Balajadia and [his companion] had been arrested and the drugs seized before he was even invited to join," 127 F.3d at 795 n.4, and that the seizure had "terminated the conspiracy," *id.* at 794 n.1.

The district court in this case denied respondents' motion for judgment of acquittal, holding that there was sufficient evidence that Recio and Lopez-Meza had joined the conspiracy before the drugs were seized. The district court nevertheless decided to grant respondents a new trial on the conspiracy count, because no *Cruz* instruction was given, creating a risk that the jury had found respondents guilty based solely on their post-seizure actions.[2] Pet. App. 64a. The jury found respondents guilty of conspiracy at the second trial.

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[2] The district court granted Lopez-Meza a new trial on the possession count as well, Pet. App. 67a, but the government dis-

3. a. A divided panel of the Ninth Circuit reversed. Pet. App. 1a-10a. The majority held that the evidence presented at the second trial was insufficient. *Id.* at 10a. Relying on *Cruz*, the court viewed the question before it as "whether any rational jury could find, beyond a reasonable doubt, that [respondents] were involved in the conspiracy *prior to the initial seizure of the drugs on November 18*." *Id.* at 3a (emphasis added). The majority was unable to find any evidence that unequivocally demonstrated respondents' pre-seizure participation in the conspiracy. For example, the majority dismissed as irrelevant the evidence that respondents lied to the police officers upon their arrest, because their false statements "provide[] no basis for concluding that [respondents] were involved in the conspiracy beforehand." *Id.* at 4a; see also *ibid.* ("Nothing [respondents] said or did * * * directly links them to the pre-seizure conspiracy."). The majority also found respondents' possession of pagers irrelevant to the timing of their involvement, reasoning that

> one would expect whoever recruited them to have outfitted them with the standard equipment used in the trade. Indeed, in light of the strange turn of events this drug shipment had taken, the main conspirators would want to stay in especially close communication with their drivers.

Id. at 5a. The panel majority concluded that the evidence suggested that respondents "were simply drivers hired at the last minute." *Id.* at 5a-6a.

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missed that count before the second trial. See *id.* at 10a n.6. Recio, who was driving the drug-laden truck, did not file a motion for judgment of acquittal on the possession count. *Id.* at 60a n.1.

The panel majority rejected the government's contention that respondents had participated in other goals of the conspiracy involving other drug shipments, even if they became involved in the November 18 shipment only after the government had seized the drugs. The court reasoned that "the limited role [respondents] played in the November 18 shipment alone is insufficient to charge them with complicity for any prior loads." Pet. App. 6a. The majority observed that "[t]he strongest evidence" of respondents' involvement in a broader conspiracy was Recio's multiple receipts for expired non-owner insurance policies, from which it could be inferred that Recio "regularly drove drug trucks for the conspiracy." *Id.* at 7a. But the majority "remain[ed] unpersuaded," because the "insurance can also be accounted for by alternative explanations," including the possibility that Recio worked as a driver for legitimate businesses. *Ibid.* The majority was also unpersuaded by the evidence indicating that Lopez-Meza lived at Nu Acres, the delivery point for the drugs, and the evidence of his links to his uncle Jose Meza, who was implicated in the conspiracy and lived at Nu Acres also. The majority reasoned that Lopez-Meza's "presence [at Nu Acres] and familial ties to Jose Meza just as readily support the theory that he was simply a convenient substitute recruited at the last minute." *Id.* at 8a.

b. Judge Gould dissented. He stated his disagreement with the court's prior holding in *Cruz*:

> [F]or the reasons stated by Judge Hall in dissent in *Cruz*, I believe *Cruz* totally inconsistent with long established and appropriate principles of the law of conspiracy. Though we are now bound by *Cruz*, and the district court was correct to apply it, I believe

> that it is an ill-advised precedent that our court should overrule en banc at the earliest opportunity.

Pet. App. 21a n.2. Nonetheless, applying *Cruz*'s rule that a defendant cannot join a conspiracy after the seizure of the drugs in question, Judge Gould concluded that there was "unmistakably more than sufficient evidence in the second trial" linking defendants to a conspiracy before police officers seized the drugs on November 18, 1997. *Id.* at 18a; see *id.* at 20a-28a. Judge Gould also concluded that the government presented sufficient evidence of respondents' involvement in a larger conspiracy involving more loads than the one seized on November 18, based on their "possession and use of sophisticated drug-trafficking communication devices" and "the quantity, quality and value of the drugs seized." *Id.* at 34a; see *id.* at 29a-34a.

c. The court of appeals denied the government's petition for rehearing en banc. Pet. App. 45a-46a. Judge O'Scannlain, joined by eight other active circuit judges, dissented from that decision. *Id.* at 46a-58a. Judge Hall, a senior judge who authored the dissenting opinion in *Cruz*, stated that she also "agree[d]" with Judge O'Scannlain's dissent. *Id.* at 58a. Judge O'Scannlain traced the court's mistake to its decision in *Cruz*:

> By failing to rehear *United States v. Recio*, 258 F.3d 1069 (9th Cir. 2001), en banc, we let stand the aberration wrought by *Cruz* now compounded by *Recio*. In so doing, we erect serious impediments to legitimate law enforcement efforts to combat drug trafficking by mandating the exclusion of relevant, probative, and, indeed, overwhelming evidence of guilt. We also perpetuate conflict with our sister circuits and, in my view, ignore black letter prin-

> ciples of conspiracy law set out for us by the U.S. Supreme Court.

Id. at 46a. Judge O'Scannlain explained that, "[i]n holding that a conspiracy endures only as long as its ultimate goal remains objectively achievable, *Cruz* imports a defense of factual impossibility into the law of conspiracy in direct conflict with the long-standing, black letter principle that impossibility is not a defense to a conspiracy charge." *Id.* at 51a.

Judge O'Scannlain stated (Pet. App. 51a-52a) that the court of appeals' recognition of factual impossibility as a defense to conspiracy conflicts with decisions of this Court, including *Salinas* v. *United States*, 522 U.S. 52 (1997), in which the Court had explained that "[a] person * * * may be liable for conspiracy even though he was incapable of committing the substantive offense[,]" because "the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself." *Id.* at 64, 65. He also stated that the rule of *Cruz* and this case conflicts with decisions of other courts of appeals, including the First Circuit's decision in *United States* v. *Belardo-Quiñones*, 71 F.3d 941, 944 (1995). See Pet. App. 52a. In Judge O'Scannlain's view, "the paradoxical effect of *Cruz* and *Recio* is to exclude evidence of guilt following successful and entirely legitimate intervention by law enforcement agents." *Id.* at 50a. Applying the "fundamental principle" that the duration of a conspiracy is determined by "'the scope of the conspiratorial agreement' itself," *id.* at 57a (quoting *Grunewald* v. *United States*, 353 U.S. 391, 397 (1957)), Judge O'Scannlain found that respondents were clearly guilty of the charged conspiracy, because the agreement to transport the drugs, to which they were

parties, survived the government's seizing the drugs. *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals' decision contravenes fundamental and well-settled principles of the criminal law. Decisions of this Court have firmly established that the gravamen of a conspiracy charge is the *agreement* to commit an illegal act; the crime does not require the actual commission of the offense. One reason that such an agreement poses a threat to society is that the combination of actors makes it more likely that the conspirators will have the means and persistence to attain their illegal goals and avoid detection. A conspiratorial agreement also poses risks, however, that go beyond the likelihood that the particular goals of the conspiracy will be achieved. The mere existence of groupings designed to achieve criminal ends threatens the community's safety, and conspirators are more likely to turn their attention to further and often more extreme illegal ends beyond those that initially motivated them. Because of those distinct threats posed by the criminal agreement alone, the crime of conspiracy focuses on the agreement.

In light of the settled principle that the gravamen of a conspiracy is the agreement, the success or failure of the conspiracy in achieving its criminal goal is of no consequence to the conspirators' criminal liability. A conspiracy may be formed to pursue a criminal goal that, unbeknownst to the conspirators, could not have been achieved. Similarly, facts that make an existing conspiracy's goals unlikely or impossible to achieve have no relevance to the conspirators' criminal liability. Accordingly, a long line of precedent over the past 120 years has made clear that factual impossibility—

whether it arises before or after a conspiracy is formed—is not a defense to criminal liability for conspiracy.

It follows from those principles that the court of appeals erred in the underlying premise of its decision in *Cruz* and in this case—that a conspiracy terminates when, unbeknownst to its participants, its goals are frustrated. The scope and duration of a conspiracy are determined by the scope and duration of the agreement, not by the likelihood or possibility that the conspiracy will be successful. So long as the agreement persists, the conspiracy persists. The actions that traditionally have been held presumptively to terminate a conspiracy—the success of the conspiracy in achieving its goals or the abandonment of those goals by the conspirators—are significant precisely because those actions can be expected to terminate the efforts of the conspirators to achieve their criminal goals. But so long as the conspirators continue to attempt to achieve their goals—as the conspirators undoubtedly did here after the drugs were first seized—the conspiracy itself continues.

The Ninth Circuit's holding that a conspiracy necessarily terminates when its goal has been frustrated would give those in respondents' position a windfall defense to conspiracy charges, based on facts of which they were not aware and that are entirely unrelated to their culpability for joining together to achieve a criminal end. The court of appeals did not attempt to reconcile its novel rule with the settled principles of conspiracy law, but instead stated, as the sole justification, that the court had doubts about possible entrapment of defendants by government agents mounting sting operations. The courts, however, do not have the authority to expand the entrapment defense to exoner-

ate defendants where the traditional requirements of that defense—government inducement and lack of predisposition—are missing.

The rule adopted in this case would seriously compromise the effective investigation and prosecution of conspiracies, not only in drug cases, but in terrorism and other criminal contexts in which law enforcement officials must both foil the success of the conspiratorial endeavor and bring those who are genuinely culpable to justice. The Ninth Circuit's rule would make it more difficult for law enforcement to engage in wholly legitimate "sting" operations such as the one in this case. And it would needlessly complicate the prosecution of conspiracies, by requiring cases involving an agreement to achieve a single criminal end to be treated as a series of separate conspiracies, depending on the entirely arbitrary factors of when the government acted to foil the conspiracy's objectives and the extent of proof that a given defendant had agreed to achieve the conspiratorial goals before or after any such government action.

ARGUMENT

A CONSPIRACY DOES NOT TERMINATE WHEN ITS OBJECTIVES HAVE BEEN FRUSTRATED OR BECOME IMPOSSIBLE TO ATTAIN

In *United States* v. *Cruz*, 127 F.3d 791 (9th Cir. 1997), cert. denied, 522 U.S. 1097 (1998), and in this case, the court of appeals held that a conspiracy automatically ends when law enforcement intervenes and frustrates the conspiracy's objective. Applying that rule, the court of appeals reversed respondents' conspiracy convictions despite overwhelming evidence of their agreement to transport 369 pounds of marijuana and 14.8 pounds of cocaine and their commission of acts in fur-

therance of that agreement. The rule of law announced in *Cruz* and applied here is inconsistent with black-letter principles of conspiracy law—in particular, the fundamental principle that the gravamen of a conspiracy is the agreement and that the possibility or likelihood of a conspiracy's achieving its objectives has no bearing on the criminal liability of the conspirators.

A. The Gravamen Of A Conspiracy Is An Agreement To Accomplish An Illegal Objective

This Court has frequently explained that "the 'essence' of a conspiracy offense 'is in the agreement or confederation to commit a crime.'" *United States* v. *Felix*, 503 U.S. 378, 389-390 (1992) (quoting *United States* v. *Bayer*, 331 U.S. 532, 542 (1947)). "[T]he criminal agreement itself is the *actus reus*." *United States* v. *Shabani*, 513 U.S. 10, 16 (1994). See *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975) ("Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act."); *Braverman* v. *United States*, 317 U.S. 49, 53 (1942) ("The gist of the crime of conspiracy * * * is the agreement or confederation of the conspirators to commit one or more unlawful acts."). That principle is fully applicable to conspiracy charges under the primary federal conspiracy statute, 18 U.S.C. 371, where an overt act in addition to the agreement must be shown, as this Court made clear in cases such as *Braverman*. It is equally apt in prosecutions under 21 U.S.C. 846, where no overt act need be shown and the agreement alone is sufficient to establish liability. See *United States* v. *Shabani*, 513 U.S. 10 (1994).

The rationale for penalizing the agreement—even if the substantive offenses that the conspirators intend to accomplish do not transpire—is that "collective criminal

agreement—partnership in crime—presents a greater potential threat to the public than individual delicts." *Callanan* v. *United States*, 364 U.S. 587, 593 (1961). In part, the threat to society posed by a conspiracy concerns the increased risks that the conspirators, by banding together, will be successful in attaining their goals and avoiding punishment. A criminal agreement "both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality." *Ibid.* A conspiracy "is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered." *United States* v. *Rabinowich*, 238 U.S. 78, 88 (1915).

In addition, however, a conspiracy poses a social threat that goes beyond the likelihood or possibility that the conspiracy's particular objectives will succeed or be punished. "[T]he danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise." *Callanan*, 364 U.S. at 594; see *Rabinowich*, 238 U.S. at 88 (threat posed by agreement "sometimes quite outweigh[s], in injury to the public, the mere commission of the contemplated crime"). That is because "[g]roup association for criminal purposes often * * * makes possible the attainment of ends more complex than those which one criminal could accomplish," and "[c]ombination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed." *Callanan*, 364 U.S. at 593-594. As one commentary has noted, "[t]he existence of a grouping for criminal purposes provides a continuing focal point for further crimes either related or unrelated to those

immediately envisaged" and "the uneasiness produced by the consciousness that such groupings exist is in itself an important antisocial effect." Developments in the Law, *Criminal Conspiracy*, 72 Harv. L. Rev. 920, 924-925 (1959).

For those reasons, the proposition that the essence of a conspiracy is the agreement—not the actual criminal conduct committed by the conspirators—is not subject to doubt. This Court has often relied on that principle, in particular in its repeated holdings that a conspiracy is distinct—and may be punished and prosecuted separately—from the substantive crime that is its object. In *Felix*, for example, the Court held that "the conspiracy charge against [the defendant] was an offense distinct from any [substantive] crime for which he had been previously prosecuted, and the Double Jeopardy Clause did not bar his prosecution on that charge." 503 U.S. at 391-392. The Court has repeated that holding in a variety of other contexts. See *Callanan*, 364 U.S. at 593 ("The distinctiveness between a substantive offense and a conspiracy to commit is a postulate of our law."); *Pereira* v. *United States*, 347 U.S. 1, 11 (1954); *United States* v. *Bayer*, 331 U.S. 532, 542 (1947); *Pinkerton* v. *United States*, 328 U.S. 640, 643 (1946).

B. A Conspiracy May Be Initiated And Persist Regardless Of The Factual Possibility Of Achieving Its Goal

1. Because the gist of a conspiracy is the agreement, and because such an agreement poses threats to society distinct from the specific crime contemplated by the conspirators, criminal liability for conspiracy has never depended on the successful commission of the conspirators' intended offenses. "It is elementary that a conspiracy may exist and be punished whether or not

the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself." *Salinas*, 522 U.S. at 65. The agreement to violate the law is "an event of sufficient threat to social order to permit the imposition of criminal sanctions for the agreement alone, * * * regardless of whether the crime agreed upon actually is committed." *United States* v. *Feola*, 420 U.S. 671, 694 (1975). See *Rabinowich*, 238 U.S. at 86 ("The conspiracy, however fully formed, may fail of its object, however earnestly pursued; the contemplated crime may never be consummated; yet the conspiracy is none the less punishable.").

Similarly, because "the illegal agreement * * * constitutes the crime," *Hyde* v. *United States*, 225 U.S. 347, 365 (1912), the possibility or impossibility of the conspirators' actually achieving their ends is of no relevance to their criminal liability for conspiracy. See Wayne LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 6.5, at 85 (1986) (LaFave & Scott) ("Impossibility of success is not a defense, as criminal combinations are dangerous apart from the danger of attaining the particular objective."). It is true that "[a] conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense." *Salinas*, 522 U.S. at 65.[3] But so long as the goal is the commission of a criminal offense, liability for conspiracy does not depend on the conspirators having adopted a likely—or even a

[3] Some particular conspiracy statutes are directed at agreements whose goal may not involve the commission of a separately defined criminal offense. See, *e.g.*, 18 U.S.C. 371 (conspiracy to defraud the United States); *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924). Absent such a prohibition in the statute, however, the object of the crime of conspiracy must be an illegal act.

possible—means to achieve their objective. As a leading treatise summarizes, "the conspiracy cases have usually gone the simple route of holding that impossibility of any kind is not a defense." LaFave & Scott § 6.5, at 92.[4]

2. Factual impossibility has never been recognized as a defense to conspiracy charges. The crime of conspiracy can be traced at least to an English statute enacted in 1285 to prohibit false prosecutions. See Percy Henry Winfield, *The History of Conspiracy and*

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[4] The courts' flat rejection of impossibility as a defense to conspiracy charges contrasts with their generally more complex treatments of impossibility, and of various types of impossibility, as defenses to attempt charges. The difference is accounted for by the fact that attempt offenses focus on the risks of the completed crime and require a "dangerous proximity to success," while "the essence of the conspiracy is being combined for an unlawful purpose—and if an overt act is required, it does not matter how remote the act may be from accomplishing the purpose." *Hyde* v. *United States*, 225 U.S. 347, 388 (1912) (Holmes, J., dissenting); see *State* v. *Moretti*, 244 A.2d 499, 502 (N.J.) ("[A] conspiracy charge focuses primarily on the Intent of the defendants, while in an attempt case the primary inquiry centers on the defendants' Conduct tending toward the commission of the substantive crime."), cert. denied, 393 U.S. 952 (1968). Nonetheless, even in the area of attempt, this Court has "expressed reservations about the continuing validity of the doctrine of 'impossibility,' with all its subtleties." *United States* v. *Aguilar*, 515 U.S. 593, 605 (1995) (brackets and internal quotation marks omitted). As a leading treatise puts it, "[t]he modern and better view is that impossibility is not a defense [to attempt charges] when the defendant's actual intent (not limited by the true facts unknown to him) was to do an act or bring about a result proscribed by law." LaFave & Scott § 6.3, at 39. It follows *a fortiori* that impossibility of that sort is not a defense to conspiracy charges. Cf. *Williamson* v. *United States*, 207 U.S. 425, 446-447 (1908) (defendant could be convicted of conspiring unsuccessfully to suborn perjury, although attempted subornation of perjury was not a crime).

Abuse of Legal Procedure 22-28 (Harold Dexter Hazeltine, ed., 1982) (1921). In 1611, in the *Poulterers' Case*, 77 Eng. Rep. 813, 813-814 (Star Chamber), the court held that a conspiracy was punishable even if its object crime remained unexecuted. In this country, the crime had achieved its modern definition by 1842. See, *e.g.*, *Commonwealth* v. *Hunt*, 45 Mass. (4 Met.) 111, 123 (1842) (Shaw, C.J.) ("[A] conspiracy [involves] a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means."). See generally Francis B. Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393, 395-401 (1922).

By the late nineteenth century, American courts began to address the question whether a conspiracy can be charged if its object has been frustrated. One of the earliest cases is *Thompson* v. *State*, 17 So. 512 (Ala. 1895), in which the convictions of participants in a conspiracy to commit robbery were affirmed, notwithstanding that the intended victim of the conspiracy had learned of the plan, thus making it impossible to achieve. The court explained that "[t]he agreement is the gist of the offense," and that the offense is not "purged because subsequent events may render the consummation of the agreement impossible." *Id.* at 515.

Courts adopted the same principle in federal cases. In *Beddow* v. *United States*, 70 F.2d 674 (8th Cir. 1934), the defendants were convicted of conspiracy to forge endorsements on government bonds. They objected that the forged endorsements would not have been accepted because they were witnessed only by a notary public, not by one of the officials designated by law to witness such endorsements. As the court summarized, the defendants contended "that the conspiracy as

alleged in the indictment and shown by the evidence could never have been successful, and, since it could not have been successful, it was not criminal." *Id.* at 676. The court rejected that argument as "without merit," because "[n]either the success nor the failure of criminal conspiracies is determinative of the guilt or innocence of the conspirators." *Ibid.*

In *Beddow*, the circumstance that was bound to frustrate the conspirators' objective apparently was an integral part of the means that the conspirators chose to carry out the conspiracy from the beginning. But the much more common situation arises where, as in *Thompson* and in this case, the circumstance that frustrates the conspiracy arose, unbeknownst to the conspirators, after the conspiracy was formed. For example, in *Craven* v. *United States*, 22 F.2d 605, 609 (1st Cir. 1927), the court affirmed that defendants could be convicted for conspiracy to import liquor, "even if * * * in effecting the conspiracy the conspirators had been imposed upon by the substitution of liquor of domestic origin."

Later federal cases have consistently applied the same principle, until the decision in this case. See, *e.g.*, *Belardo-Quinones*, 71 F.3d at 944 ("[A] culpable conspiracy may exist even though, because of the misapprehension of the conspirators as to certain facts, the substantive crime which is the object of the conspiracy may be impossible to commit."); *United States* v. *Wallace*, 85 F.3d 1063, 1068 (2d Cir. 1996) ("That the conspiracy cannot actually be realized because of facts unknown to the conspirators is irrelevant."); *United States* v. *Hsu*, 155 F.3d 189, 203 (3d Cir. 1998) ("[W]e are persuaded by the views of our sister circuits, that the impossibility of achieving the goal of a conspiracy is irrelevant to the crime itself."); *United States* v. *Seelig*,

498 F.2d 109, 113 (5th Cir. 1974) ("The fact that a government informant was to effect the actual distribution of the drug does not extirpate [defendants'] liability for conspiring [under 21 U.S.C. 846]."); *United States* v. *LaBudda*, 882 F.2d 244, 248 (7th Cir. 1989) ("[D]efendants can be found guilty of criminal conspiracy even though the object of their conspiracy is unattainable from the very beginning."); *United States* v. *Shively*, 715 F.2d 260, 266-267 (7th Cir. 1983) (reasoning that it is "enough if the defendants intend to defraud a federally insured bank, even though, unbeknownst to them, the bank has lost its insurance"), cert. denied, 465 U.S. 1007 (1984); *United States* v. *Jones*, 765 F.2d 996, 1002 (11th Cir. 1985) (stating that "sheer impossibility is no defense" to charge under 21 U.S.C. 846); *United States* v. *Sarro*, 742 F.2d 1286, 1297 (11th Cir. 1984) ("[T]he government did not have to prove that the [goods] were *actually* stolen; it was enough for the government to show that the conspirators conspired [to receive goods] which they *believed* were stolen.").[5]

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[5] This Court has considered—and rejected—"impossibility" defenses to conspiracy charges in related contexts, in which a defendant who could not have been convicted of committing the substantive offense that was the conspiracy's object asserted that he also could not have been held liable for conspiring with others who could have committed that substantive offense. See *Rabinowich*, 238 U.S. at 86 (defendant who had not declared bankruptcy may be convicted for conspiring to conceal property from bankruptcy trustee, even though substantive offense may be committed only by one who has declared bankruptcy); *Drew* v. *Thaw*, 235 U.S. 432 (1914) (defendant could be convicted of conspiring to escape from insane asylum under New York law, although escaping from insane asylum is not a crime). As the Court explained in *Rabinowich*, "[a] person may be guilty of conspiring, although incapable of committing the objective offense." *Rabinowich*, 238 U.S. at 86.

C. A Conspiracy Does Not Terminate Merely Because Achieving Its Goals Has Become Impossible

1. Under the long-settled principles recited above, the likelihood that a conspiracy will be able to achieve its goals has nothing to do with the existence or continuation of criminal liability for participating in the conspiracy. Because the essence of a conspiracy is the agreement, "the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects," *Braverman*, 317 U.S. at 53, not by reference to the factual circumstances that render the conspiracy's success more or less likely—or even render its success impossible. It is the conspiratorial agreement that "determines * * * the duration of the conspiracy." *Grunewald*, 353 U.S. at 397. The conspiracy endures while the agreement endures—regardless of whether the conspirators' beliefs about the possibility of success are mistaken.

In this case, for example, there was no doubt that the agreement was ongoing when respondents joined it. Respondents' fulfillment of their assignment to pick up the drugs demonstrated that the conspiracy was still actively seeking to achieve its objectives at least until respondents were arrested. And that remains true even though the truckload of drugs, unbeknownst to many of the conspirators, had been seized and co-conspirator Arce had agreed to cooperate in capturing the remaining conspirators. Those remaining conspirators, unaware of the government's discovery of their plot, continued to pursue their agreement to possess and distribute the drugs. Accordingly, in light of the conspirators' continuing efforts to realize the conspiracy's purposes, the conspiracy clearly did not terminate with the seizure of the drugs.

That does not mean that a conspiracy continues indefinitely. This Court has held that, so long as the conspirators "continue * * * efforts in pursuance of the plan[,] the conspiracy continues up to the time of abandonment or success." *United States* v. *Kissel*, 218 U.S. 601, 608 (1910); see Model Penal Code § 5.03(7), at 384 (1985). Either abandonment or success will terminate the conspiracy, since in either event the conspirators will cease their endeavors collectively to violate the law in the particular way contemplated by the agreement. But the occurrence of events that, unbeknownst to the conspirators, render the conspiracy's success unlikely or impossible does not terminate a conspiracy, because such events do not terminate the conspirators' "continue[d] * * * efforts in pursu[it] of the plan."[6] *Kissel*, 218 U.S. at 608.

2. The Ninth Circuit's holding in this case was based on the novel proposition, articulated in *Cruz*, that a conspiracy terminates not only when it succeeds or is abandoned, but that a conspiracy also terminates with the "defeat of the object of the conspiracy." *Cruz*, 127

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[6] With respect to a particular defendant, liability for participation in a conspiracy may terminate before the conspiracy itself has terminated. A conspirator retains the ability "to withdraw from the execution of the offense or to avert a continuing criminality." *Hyde*, 225 U.S. at 369. To do so requires the conspirator to take "affirmative action * * * to disavow or defeat the purpose" of the conspiracy. *Ibid.* As this Court has explained, "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 464-465 (1978). The occurrence of events that, unbeknownst to the conspirators, make it factually impossible for the conspiracy to achieve its goals has never been recognized as sufficient to constitute withdrawal or abandonment.

F.3d at 795 (quoting *United States* v. *Castro*, 972 F.2d 1107, 1112 (9th Cir. 1992), cert. denied, 507 U.S. 944 (1993)). See *id.* at 795 & n.4 ("[T]he conspiracy * * * had been terminated by the government's seizure of the methamphetamine before Cruz became involved. * * * [I]t was factually impossible for Cruz to have been a member of [the] conspiracy because [other members] had been arrested and the drugs seized before he was even invited to join."). In the court's view, the objects of the conspiracies in this case and in *Cruz* were defeated when the drugs in each case were seized. Because in the court's view the conspiracies terminated at that time, individuals, such as respondents, who were not shown to have joined the conspiracies before the seizures could not be held criminally liable for their participation.

Neither in this case nor in *Cruz* did the court of appeals make any effort to reconcile its holding that a conspiracy terminates when its object is defeated with the long-settled rejection of impossibility as a defense to conspiracy. Instead, the court in *Cruz* simply quoted its own prior decision in *Castro* for the proposition that the "defeat of the object of the conspiracy" terminates a conspiracy. That reliance was misplaced. The court in *Castro* did employ the phrase "defeat of the object of the conspiracy." See *id.* at 1112. But it applied that phrase correctly to refer not to the occurrence of events rendering achievement of the conspiracy's goals impossible, but to the occurrence of events that led the conspirators to abandon their efforts to achieve the conspiracy's end. See 972 F.2d at 1112 ("the object of the conspiracy was not defeated until *the final seizure of cocaine and the arrest of the coconspirators*") (emphasis added). The seizure of the cocaine, together with the arrest of all of the conspirators, was likely to terminate

the conspirators' agreement to distribute cocaine, at least absent evidence that the agreement continued. Cf., *e.g.*, *United States* v. *Davis*, 226 F.3d 346, 353 (5th Cir. 2000) ("Where there is evidence that conspirators managed to continue conducting the business of the conspiracy after arrest, the mere fact of arrest does not prevent the government from relying on that evidence" to show that conspiracy continued.), cert. denied, 531 U.S. 1181 (2001); *United States* v. *Zarnes*, 33 F.3d 1454, 1468 (7th Cir. 1994) ("The arrest or incarceration of a conspirator may constitute a withdrawal for a conspirator, but it does not as a matter of law."), cert. denied, 515 U.S. 1126 (1995) (citation omitted).

Castro itself cited *United States* v. *Bloch*, 696 F.2d 1213, 1215 (9th Cir. 1982), for the proposition that defeat of the object of the conspiracy terminates a conspiracy, and *Bloch*, in turn, cited *United States* v. *Krasn*, 614 F.2d 1229, 1236 (9th Cir. 1980). *Krasn*, however, stated a quite different, and correct, principle: that a jury was correctly instructed on withdrawal from a conspiracy when it was instructed that liability for membership in a conspiracy "is presumed to continue unless there is affirmative evidence that the defendant abandoned, withdrew from, or disavowed the conspiracy or defeated its purpose." 614 F.2d at 1229. *Krasn* was generally correct that a defendant's liability for a conspiracy terminates when a "defendant * * * defeat[s] its purpose." See note 6, *supra*. The court in *Cruz* and in this case erred in adopting the quite different principle that a conspiracy terminates when its goal becomes impossible to achieve, even if the defendant, far from defeating the conspiracy's purpose, is actively attempting to achieve it.

D. The Ninth Circuit's Holding That A Conspiracy Terminates If Its Goal Is Factually Impossible To Achieve Creates Obstacles To Successful Law Enforcement And Bestows An Unwarranted And Arbitrary Windfall On Conspiracy Defendants

The Ninth Circuit's rule that a conspiracy terminates when, unknown to the conspirators, their objective has become impossible to achieve would undermine the effective administration of justice and create arbitrary obstacles to the use of perfectly legitimate law enforcement methods. As Judge O'Scannlain demonstrated in his dissent from the denial of rehearing en banc (Pet. App. 49a-50a), the *Cruz*/*Recio* rule requires courts and juries to conduct an exacting review of the evidence to determine whether the defendant's participation in an agreement to distribute drugs predated or postdated the government's seizure of the drugs. Not only does that determination needlessly complicate the litigation of conspiracy cases, it has nothing to do with the defendant's culpability. It thus creates an arbitrary windfall for defendants lucky enough to have the conspiracy's objectives foiled before they can be shown to have joined in the venture.

1. This case presents an example of the arbitrariness injected into the law of conspiracy by the court of appeals' ruling. Respondents undoubtedly agreed to participate in the distribution of drugs. The court of appeals not only accepted that premise, but found that the evidence was sufficient to support it. For example, the court accepted that respondents' false statements at the time of arrest "point[] * * * to knowledge that they were involved in illicit activity at that time." Pet. App. 4a. The court also accepted that respondents' possession of pagers was incriminating when it noted that

"one would expect whoever recruited them to have outfitted them with the standard equipment used in the trade" and that "the main conspirators would want to stay in especially close communication with their drivers." *Id.* at 5a. See *id.* at 5a-6a (accepting that the evidence suggest[ed] "that [respondents] were simply drivers hired at the last minute"). Despite the presence of overwhelming evidence of respondents' guilt—including their arrest with the truck containing more than $10 million of drugs—the court of appeals nonetheless held that respondents could not be convicted of conspiracy to distribute drugs. Traditional principles of conspiracy law would have assessed respondents' guilt by asking whether they entered into a criminal agreement. The court of appeals' rule, by contrast, precludes respondents' guilt based on a fact—*i.e.*, the time of seizure of the truck—of which they were unaware, over which they had no control, and that had nothing to do with their agreement. Under the court of appeals' rule, if respondents had agreed to join the conspiracy before 1:18 a.m. on November 18, they could be found guilty; if they had agreed to do so after that time, they could not.

2. The *Cruz* court justified its application of factual impossibility not by reference to the defendant's culpability under traditional conspiracy law, but by expressing concern that "liability for the original conspiracy on the basis posited by the government could be endless." 127 F.3d at 795. The court speculated that "[i]t is not difficult to picture [the conspirator who had been arrested with drugs] sitting in the Honolulu Airport Police Station with a copy of the * * * telephone directory in hand, following the detectives' instructions to call all of his acquaintances * * * to come to Honolulu to help him." *Id.* at 795 n.3.

That concern provides no reason to doubt that a defendant may be guilty of conspiracy even when the crime may in fact, though unbeknownst to him, be impossible to accomplish. Rather, it expresses misgivings about law enforcement techniques involving "sting" operations. While courts may consider law enforcement techniques under the entrapment defense, this Court has squarely rejected expanding the entrapment defense to exonerate defendants in cases where the traditional requirements of that defense—government inducement and lack of predisposition—are missing. As the Court explained in *United States* v. *Russell*, 411 U.S. 423, 435 (1973),

> the defense of entrapment * * * was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve. The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations.

The court of appeals exercised precisely the kind of "veto" that *Russell* prohibits in this case and in *Cruz*, by exonerating those guilty of the crime of conspiracy in order to place limits on certain law enforcement techniques. To make matters worse, the court of appeals altered the law of conspiracy not to protect against the actual law enforcement techniques used in *Cruz* and in this case, but in order to protect against the possible, and entirely hypothetical, wholesale use of those techniques in other circumstances in which, in the court's view, they would not have been justified.

3. Although the court of appeals in this case did not address the possibility that respondents may be liable for a post-seizure conspiracy, the Ninth Circuit in *Cruz* suggested that the defendant there, though innocent of the charged conspiracy, "at most, * * * may have been a member of a *new* conspiracy" formed after the seizure. 127 F.3d at 795 n.4. In his dissent from the denial of rehearing en banc in this case, Judge O'Scannlain doubted that any liability for a post-seizure conspiracy would be possible under the logic of *Cruz*; if the government's seizure of the drugs terminated the original conspiracy, the government's seizure would also appear to have precluded the formation of a new conspiracy to distribute the same drugs. Pet. App. 53a-56a (opinion of O'Scannlain, J.).

If, as Judge O'Scannlain feared, the *Cruz*/*Recio* rule precludes all conspiracy liability for defendants in respondents' position, the rule would have most serious consequences. It would discourage investigators from engaging in operations that ferret out criminal operations and that prevent conspiracies from achieving their objectives for fear that such action will compromise the government's ability to prosecute all of the guilty participants. In the analogous context of rejecting a claim that impossibility is a defense to an attempt charge under Section 846, the Third Circuit has explained:

> Allowing the [impossibility] defense [under Section 846] would also gut law enforcement efforts to infiltrate drug supply chains. The government goes undercover not only as purchaser, as in the instant case, but as seller, or as middleman. * * * Given the horrendous difficulties confronted by law enforcement authorities in dealing effectively with the

> burdgeoning drug traffic, it is difficult to assume that Congress intended to deprive them of flexibility adequate to counter effectively such criminal activity.

United States v. *Everett*, 700 F.2d 900, 907-908 n.16 (1983) (internal quotation marks and citations omitted). The vital need for undercover government efforts both to apprehend conspirators and to prevent their planned offenses from actually occurring extends far beyond drug cases; similar legitimate law enforcement tactics may be crucial in violent crime, terrorism, and other contexts.

Even if the *Cruz*/*Recio* rule would permit those in respondents' position to be held liable for a post-seizure conspiracy, it would nonetheless cause unnecessary complications in the framing of indictments. A prosecutor in a case like this would have to decide whether the evidence supported charging a single conspiracy spanning the pre- and post-seizure periods. Charging a single conspiracy would be in the interest of logic and judicial economy, but it would require the prosecutor to determine whether, for each defendant, the evidence would ultimately be held sufficient to support a conclusion of pre-seizure participation in the conspiracy. A mistaken determination by the prosecutor on that point would risk the result obtained in *Cruz* and this case: acquittal for at least some defendants. If the prosecutor instead chose to charge multiple conspiracies, one ending with the seizure and the second beginning thereafter, other complications would arise. Such charges may elicit double jeopardy and multiplicity challenges by the defendants who participated both before and after the government frustrated the "original" conspiracy's objective. The charges may also

elicit challenges to the joinder in a single indictment of the pre- and post-seizure conspirators, see Fed. R. Crim. P. 8, and to the conduct of a joint trial involving all defendants, see Fed. R. Crim. P. 14.

4. The *Cruz*/*Recio* regime thus threatens to entangle conspiracy prosecutions in complex challenges to the indictment, to the admissibility and sufficiency of evidence, and to jury instructions. All of those consequences arise from the *Cruz*-imposed centrality of the seizure date to the proof of the relevant conspiracy—a fact that is unrelated to the defendants' culpability under traditional conspiracy law. In cases where those challenges are successful, as they were here and in *Cruz*, guilty defendants may escape conviction and punishment. The court of appeals' innovation in conspiracy law should be rejected.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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